IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.950 OF 2001

Vithal Muktaji Mahale
(since deceased through L.Rs.)
1a) Prakash Vithal Mahale
1b) Haribhau Vithal Mahale
1c) Yeshwant Vithal Mahale
1d) Shobha Vithal Mahale
1e) Sau Houshabai Madhavrao More
1f) Sau.Meerabai Eknath

2. Jarvgaru Muktaji Mahale
(since deceased through L.Rs.)
2a. Dashrath Karbhari Mahale
2b. Murlidhar Karbhari Mahale
2c. Keshav Karbhari Mahale
2d. Chandrabhagabai M. Gaikwad
2e. Sushila Vasatrao Kale

3. Patilbuwa Muktaji Mahale
(since deceased through L.Rs.)
3a. Dattatraya Patilbuwa Mahale
3b. Sahebrao Patilbuwa Mahale
3c. Hirabai Parashuram Khapre
3d. Kedubai Sampat Kadam
3e. Baby Madhu Phad
3f. Suman Pundlik Rakibe ...Appellants

vs.

Ishwardas Tulshidas Bairagi
(since deceased through L.Rs.)
1a. Anilkumar Ishwardas Bairagi
1b. Kumar Ishwardas Bairagi
1c. Shashikumar Ishwardas Bairagi
1d. Narayan Ishwardas Bairagi
1e. Suman Madhavdas Buva
1f. Tarabai Pralhad Bairagi
1g. Shakuntala Shivdas Vaishnav
1h. Pushpa sudam Vaishnav
1i. Gangubai Ishwardas Bairagi

2. Ambadas Kisandas Bairagi
2a. Shantabai Ambadas Bairagi
2b. Vishnudas Ambadas Bairagi
2c. Rajendra Ambadas Bairagi
2d. Bharati Narayandas Bairagi
2e. Ranjana Santoshkumar Kotekar

3. Vaishali Bhaskarrao Bankar
4. Sunanda Prabhakar Bankar

5. Shila Bhausaheb Bankar
6. Minakshi Arun Kale
7. Vandana Balasaheb Kale ...Respondents

Mr.R.M.Hardas i/b Mr.P.N.Joshi for the Appellants
Mr.Anilkumar Patil for Respondent No.1-A to 1-I
Mr.M.M.Sathaye for Respondent Nos.2a to 2e.

CORAM: ABAY S. OKA,J.
DATE ON WHICH SUBMISSIONS ARE HEARD : JUNE 27,2007,
DATE OF PRONOUNCEMENT OF JUDGMENT: JULY 20, 2007.

JUDGMENT:

1. This is an Appeal under clause (u) of Rule 1 of Order XLIII of the Code of Civil Procedure,1908. This Appeal was admitted on 19th December 2005. The Appeal appeared on final hearing board on 16th March 2007. On that day it was brought to the notice of this court that in view of the decision of the Apex Court in case of Narayanan Vs. Kumaran and others [(2004) 4 S.C.C. 26], this Appeal will have to be treated as an Appeal on par with an Appeal under section 100 of the said Code. Therefore, this court framed following three substantial questions of law :

(i) Whether the Appellate Court was justified in invoking the discretionary power under Rule 33 of Order XLI of the Code of Civil Procedure,1908 at the instance of the legal representatives of the Defendant No.4 and the other Defendants who are claiming through Defendant No.4 though the Defendant No.4 had full opportunity to participate in the trial and to lead evidence ?

(ii) Whether the Appellate Court was justified in invoking the discretionary power under Rule 33 of Order XLI of the said Code for the benefit of the parties who can be said to be negligent?

(iii) Whether the Appellate Court could have passed an order of remand when neither the original Plaintiff nor the legal representatives of Defendant No.4 had made any grievance regarding failure of the trial court to frame proper issues or failure of the trial court to give an opportunity of leading evidence to the said parties ?

Even before framing the questions of law, the learned Advocates for the parties had made extensive submissions on merits of the Appeal. Further submissions were heard on 27th June 2007. The Respondents have filed their written submissions.

2. The Appellants are the first to third defendants in a suit filed by the first Respondent. The Respondent No.2(a) to 2(e) are the legal representatives of the original Defendant No.4. The other Respondents are subsequent purchasers claiming through the Defendant No.4.

3. The first Respondent filed a suit for possession of the

lands survey no.647 and 648 situated in village Vani, Pimpalgaon, District Nashik. The second Respondent (4th defendant) is the real brother of the first Respondent. The Appellants are the legal representatives of late Muktaji Bale who are admittedly in possession of the suit lands. The suit was filed by the first Respondent contending that he was the owner of the suit lands along with the fourth Defendant. According to the case of the first Respondent, the father of the Appellants was claiming to be a tenant in respect of the suit lands. According to the case of the first Respondent, the father of the Appellants could not purchase the suit lands under the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948. It is alleged by the first Respondent that after the demise of the father of the appellants, the Appellants obtained possession of the suit lands forcibly in the month of June 1976. According to the case of the first Respondent, the appellants have no right, title or interest in respect of the suit lands.

4. The suit was contested by the Appellants by filing a written statement. According to their case, their father was inducted as an agricultural tenant in the year 1939-40. According to the appellants, their father could not succeed in purchasing the suit lands as his right was forfeited. However, their father continued to be in possession of the suit land and after his demise, the Appellants have been in possession. It is stated that the Appellants partitioned the

suit lands and the land bearing Gat No.647 has been allotted to the share of the first Appellant and the land bearing Gat No.648 has been allotted to the share of second and third Appellants. A plea is also raised by the Appellants that they have become owners of the suit land by adverse possession. It is contended that during the lifetime of the father of the first Respondent, he was given in adoption to one Tulsidas and therefore the first Respondent cannot assert ownership rights.

5. The trial court dismissed the suit by holding that the Appellants have established that they have become the owners of the suit land by way of adverse possession. In an Appeal preferred by the first Respondent, by the impugned Judgment and Order, the learned Additional District Judge remanded the suit to the trial court for deciding the question whether the first Respondent and the Respondents Nos.2(a) to 2(e) are entitled to recover the possession of the suit lands being the owners thereof to the extent of half share each and if the first Respondent fails to prove his share, whether the Respondent Nos.2(a) to 2(e) (i.e. the legal representatives of the deceased fourth defendant) can recover the possession of the suit lands. The Appellate Court permitted the parties to adduce evidence. The Appellate Court also granted liberty to the Respondent Nos. 4(A) to 4(E) in the said Appeal before it as well as Respondent Nos.5 to 9 in the said Appeal (the transferees of the original defendant No.4) to transpose themselves as the plaintiffs. While passing the order of

remand, the learned Additional District Judge recorded a finding that the appellants have not established their plea of adverse possession.

6. The submission made by the learned Counsel for the Appellants is that there was no occasion for the Appellate Court to grant relief in favour of the legal representatives of the original defendant No.4 and the other defendants who were claiming through the original defendant No.4. He submitted that the defendant No.4 was alive during the pendency of the suit in the trial court and he was given full opportunity to participate in the proceedings and to lead the evidence. He submitted that the fourth defendant was negligent and did not participate in the proceedings. He submitted that even assuming that the Appellate Court was entitled to exercise the powers under Rule 33 of Order XLI of the said Code, the said power could not have been exercised in favour of the party who was negligent. He submitted that there was no grievance made by any of the parties as regards failure to frame the proper issues or to give an opportunity to the parties to lead evidence.

7. The learned counsel for the contesting Respondents submitted that no interference is called for with the impugned order. The learned counsel for the Respondents submitted that though the real brother of the first Respondent was impleaded as fourth defendant, the court fee was paid in the suit on the

share of both the first Respondent-Plaintiff and fourth defendant herein. He submitted that none of the Appellants had filed any cross objection for challenging the finding recorded by the trial court against them. He submitted that the Respondent Nos.3 to 7 have subsequently stepped into the shoes of the original defendant No.4 and therefore, the Appellate court thought it fit to give an opportunity to the said Respondents to adduce evidence as they have stepped into shoes of fourth defendant. It is submitted that no substantial question of law arises in this Appeal and therefore, no interference is called for.

8. I have carefully considered the submissions. The Trial court recorded a finding that the Appellants have become the owners by adverse possession. The trial court framed an issue whether the suit properties were ancestral properties of the first Respondent (original plaintiff) and the fourth defendant. The said issue was answered in the negative. Issue no.6 was whether the original plaintiff along with fourth defendant were entitled to recover the possession of the suit property. The learned trial Judge has noted that the fourth defendant remained absent throughout the proceedings and the suit proceeded exparte against him. The learned trial Judge has also recorded that the legal representatives of the original defendant No.4 did not contest the suit and they were also declared exparte. It must be borne in mind that the appeal was filed before the District Court by the legal

representatives of the original plaintiff. it is also not in dispute that during the pendency of the Appeal, the legal representatives of the defendant No.4 purported to sell the property to the Respondent nos.3 to 7 herein. In the impugned Judgment and Order, the Appellate Court has recorded the submissions made by of the counsel appearing for the added Respondents (i.e. 3rd to 7th Respondent) who were claiming through the original defendant No.4. It appears that the counsel who appeared for the added Respondents had also appeared for the legal representatives of the original defendant No.4. Though submissions made by the counsel appearing for the parties are reproduced in the Judgment by the learned Judge, it is not recorded by the learned Judge that the Counsel for the legal representatives of the defendant No.4 made any prayer for remand. No submission appears to have been made that either the defendant No.4 or his legal representatives were denied an opportunity to lead the evidence.

9. Now, it will be necessary to refer to the reasons recorded by the learned Judge. The learned Judge has noted that the legal representatives of the defendant No.4 have not challenged the decree of the trial court and have also not filed any cross objection. The learned Judge has observed that the original defendant No.4 had better title than the Appellants. In paragraph 29 of the Judgment, the learned Judge has recorded that as the defendant No.4 or his legal

representatives did not appear in the trial court, the present Appellants (defendant Nos.1 to 3) did not get sufficient opportunity to challenge the title of the defendant No.4. This is a very strange observation made by the appellate Court. The Appellate Court further proceeds to observe that the Defendant No.4 did not apply for transposing himself as a Plaintiff. The learned Judge reiterated that the present Appellants did not get an opportunity to lead evidence to challenge the title of defendant No.4. The learned Judge observed that the trial court has rightly held that merely because the original plaintiff has failed to prove his title, the defendant No.4 cannot become exclusive owner.

10. The first reason given by the learned Judge for passing the order of remand is that there is no specific issue framed as regards adoption of the plaintiff and the Trial court has decided the matter in a casual manner. I have perused the pleadings and notes of evidence. The pleadings as well as notes of evidence and the Judgment of the Trial Court shows that all the parties were fully aware that the issue of legality and validity of adoption was certainly involved. Therefore,this is no ground to pass an order of remand.

11. The second ground is that the present Appellants (defendant Nos.1 to 3) will get an opportunity to challenge the title of the defendant No.4 and the plaintiff will also get an opportunity to prove as to how his name was entered in

the record of rights. The present Appellants have not sought order of remand or an opportunity to lead further evidence and therefore, the said ground is completely untenable.

12. The third ground given is that the legal representatives of the defendant No.4 or the added Respondents in the Appeal can seek permission to transpose themselves as plaintiffs. It was not their case that they want to transpose themselves as Plaintiffs. Therefore, there could not be a remand on the said ground.

13. This is not a case where any of the parties had come before the Appellate Court with the grievance that they were not granted sufficient opportunity to lead the evidence. This is also not a case where by reason of failure to frame any particular issue, any prejudice has been caused to the parties.

14. Therefore, the order of remand was totally uncalled for. The learned Judge has gone to the extent of observing that the trial court will permit either the legal representatives of the Defendant No.4 or the added Respondents to transpose themselves as Plaintiffs. This observation was totally uncalled for as none of the said parties had made such a request.

15. It must also be stated here that this was not a fit case

to exercise power under Rule 33 of Order XLI of the Code of Civil Procedure,1908 in favour of the legal representatives of the defendant no.4 or in favour of their transferees. Neither the defendant No.4 nor his legal representatives had chosen to appear before the trial court. It is not the case that they were prevented from appearing before the trial court for any sufficient cause. It is well settled position of law that the jurisdiction or power under Rule 33 of Order XLI cannot be exercised in favour of a party who is negligent. Therefore, the Appellate Court has committed a gross error. The Appellate Court ought to have decided the Appeal on merits. Therefore, the impugned order deserves to be quashed and set aside and the Appellate court will have to be directed to decide the Appeal afresh on all issues.

16. Hence, I pass the following order :

i) Impugned Judgment and Order dated 30th August 2001 is quashed and set aside and the Civil Appeal No.177 of 1996 is restored to the file.

ii) The parties are directed to appear before the learned Principal District Judge, Nasik on 13th August 2007 for fixing the schedule of the hearing. The learned Principal District Judge may himself take up the Appeal for hearing or may assign it to any other learned Judge considering his administrative convenience.

iii) All contentions of the parties on merits are expressly kept open.

iv) The Appeal from Order is partly allowed in above terms with no order as to costs.

v) Parties and the concerned Court to act upon an authenticated copy of this order.

JUDGE